STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID O. MOSS, a/k/a DAVID OZEAR MOSS,

Defendant-Appellant.

UNPUBLISHED
May 2, 1997

No. 190968
Recorder's Court
LC No. 94-009053

Before: Hood, P.J., and Saad and T.S. Eveland,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of attempted breaking and entering, MCL 750.92; MSA 28.287; MCL 750.110; MSA 28.305, and malicious destruction of a building under $100, MCL 750.380; MSA 28.612. Defendant was sentenced to serve ninety days in prison for the malicious destruction of a building conviction, to be served concurrently to a sentence for six to twenty years in prison for the attempted breaking and entering conviction, as enhanced by the habitual fourth offender statute, MCL 769.12; MSA 28.1084. We affirm in part and vacate in part.

I

Defendant challenges three separate instructions given by the trial court. Instructions to the jury should be considered as a whole rather than extracted piecemeal to establish error. *People v Bell,* 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues and sufficiently protected the defendant's rights. *Id.*

Defendant first contends that the trial court's instructions on the elements of attempted breaking and entering usurped the fact-finding function of the jury. We disagree. A trial court is required to instruct the jury as to the law applicable to the case and, in doing so, it may comment on the evidence. MCL 768.29; MSA 28.1052. However, a trial court may not state as a fact that which the undisputed evidence tends to prove. *People v Brian Harris*, 37 Mich App 409, 410; 195 NW2d 29 (1971).

* Circuit judge, sitting on the Court of Appeals by assignment.

Here, the trial court did not announce to the jury that one of the essential elements had been established. Rather, the trial court simply explained that the evidence tended to show an attempt, by whomever, to commit some kind of breaking and entering, but that it was for the jury to decide whether to believe the evidence. Because this instruction made it plain to the jury that the ultimate determination was theirs alone, see *People v Lintz*, 244 Mich 603, 617-618; 222 NW 201 (1928), it did not remove from the jury consideration of an essential element of the offense. Cf. *Brian Harris*, 37 Mich App at 410.

Defendant next claims that the trial court erred when it instructed the jury regarding a previous ruling on the constitutionality of the on-the-scene identification procedure. We disagree. Defendant's argument that the instruction was analogous to instructing the jury on the outcome of a *Walker*[1] hearing is unconvincing. While it makes no sense to ask a jury whether a statement has been made after informing the jury that the statement was voluntary, *People v Mathis (On Remand)*, 75 Mich App 320, 324; 255 NW2d 214 (1977), the same is not true of asking a jury whether an identification was reliable after informing the jury that no constitutional rights were violated in the process of conducting an identification.

Defendant next contends that the trial court erred when it instructed the jury regarding the process by which criminal charges are brought. We disagree. Defendant's argument relies exclusively on *People v Hudson*, 123 Mich App 624, 625; 333 NW2d 12 (1982). In *Hudson*, this Court held that the burden of proof shifted to the defendant when the trial court erroneously instructed the jury that a preliminary examination had been conducted to establish that a crime had been committed, and that there was probable cause to believe that the defendant had committed the crime. *Id.* Here, unlike *Hudson*, the trial court did not state that there was probable cause to believe defendant had committed the crime charged. Because the trial court: (1) did not allow the witness to answer the prosecutor's question about probable cause, (2) did not instruct the jury that probable cause was the "constitutional and legal" standard which had to be met at a preliminary examination in order for charges to be brought, and (3) never referred to the state of the pre-trial evidence against defendant in particular, the instruction was not erroneous. Moreover, the trial court gave explicit instructions on the presumption of innocence and reasonable doubt. Therefore, considered as a whole, the instructions fairly presented the issues and sufficiently protected defendant's rights.

II

Defendant next contends that the prosecution failed to present sufficient evidence to sustain his misdemeanor conviction of malicious destruction of a building under $100. We agree. Therefore, defendant's conviction for malicious destruction of a building is vacated.

Because there is no indication on the record that defendant's conviction of malicious destruction of a building under $100 was a factor at sentencing for the attempted breaking and entering conviction (which was vacated below) or at sentencing on the habitual fourth offender,[2] we decline defendant's request for resentencing.

Given our resolution of defendant's sufficiency claim, we need not address defendant's double jeopardy argument.

Defendant's conviction for breaking and entering, and the sentence of six to twenty years, as an habitual fourth offender, is affirmed. Conviction and sentence for malicious destruction of building is vacated. No resentencing is necessary due to concurrent original sentences.

Affirmed in part, vacated in part.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Thomas S. Eveland

[1] See *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

[2] Defendant has ten prior misdemeanor convictions and seven prior felony convictions.